

Item SPR06-41 Response Form

Title: Alternative Dispute Resolution: Participation in Court-Ordered Arbitration and Mediation (adopt Cal. Rules of Court, rule 1611.5 and amend rules 1611, 1614, 1615, and 1634)

- ☐ **Agree** with proposed changes
- ☐ **Agree** with proposed changes **if modified**
- ☐ **Do not agree** with proposed changes

Comments: _____

Name: _____ Title: _____

Organization: _____

☐ **Commenting on behalf of an organization**

Address: _____

City, State, Zip: _____

Please **write** or **fax** or **respond using the Internet** to:

Address: Ms. Romunda Price,
Judicial Council, 455 Golden Gate Avenue,
San Francisco, CA 94102
Fax: (415) 865-7664 **Attention:** Romunda Price
Internet: www.courtinfo.ca.gov/invitationstocomment

DEADLINE FOR COMMENT: 5:00 p.m., Friday, June 23, 2006

Your comments may be written on this *Response Form* or directly on the proposal or as a letter. If you are not commenting directly on this sheet please remember to attach it to your comments for identification purposes.

*Circulation for comment does not imply endorsement by the Judicial Council,
the Rules and Projects Committee, or the Policy Coordination and Liaison Committee.
All comments will become part of the public record of the council's action.*

Invitations to Comment SPR06-41

Title	Alternative Dispute Resolution: Participation in Court-Ordered Arbitration and Mediation (adopt Cal. Rules of Court, rule 1611.5 and amend rules 1611, 1614, 1615, and 1634)
Summary	The proposal would (1) establish new requirements for attendance and participation in judicial arbitration conducted under Code of Civil Procedure section 1141.10 et seq. and (2) clarify existing requirements for attendance, establish new requirements for submission of participant lists, and authorize mediators to require submission of mediation statements in Civil Action Mediation conducted under Code of Civil Procedure section 1775 et seq.
Source	Civil and Small Claims Advisory Committee, Subcommittee on Alternative Dispute Resolution
Staff	Alan Wiener, 818-558-3051, alan.wiener@jud.ca.gov
Discussion	<p><u>Background</u></p> <p>The California Code of Civil Procedure generally provides that courts may submit unlimited civil cases in which the amount in controversy does not exceed \$50,000 for each plaintiff to judicial arbitration (if the court has a judicial arbitration program under section 1141.10 et seq.) or to mediation (if the court has a Civil Action Mediation program under section 1775 et seq.).</p> <p>With respect to judicial arbitration, the statutes and California Rules of Court do not currently specify whether the litigants must attend or how they must participate. Courts and litigants have expressed concern that parties, attorneys, and insurers frequently do not attend or participate in these court-ordered alternative dispute resolution (ADR) processes as they should. Some superior courts have adopted local rules that specify varying requirements for attending or participating in judicial arbitration.</p> <p>With respect to Civil Action Mediation, the California Rules of Court currently provide that the parties, counsel, and an insurance representative of a covered party must be present or available at all mediation sessions, unless excused by the mediator. However, the rule is not as clear as it might be and courts, mediators, and litigants have expressed concerns that parties, attorneys, and insurers often do not attend or participate in court-ordered mediation as they should.</p>

This proposal would establish requirements for participation in judicial arbitration and clarify the requirements for attendance at Civil Action Mediation, with the goal of making these court-ordered ADR processes more efficient and effective. The texts of the proposed new and amended rules are attached, beginning at page 4. Key provisions of the rules are summarized below.

Participation in Judicial Arbitration

Attendance at arbitration hearing

Rule 1611.5(a) would require all parties and attorneys of record to attend the judicial arbitration hearing in person and require a party that is not a natural person to attend by a representative who is knowledgeable about the issues in dispute and authorized to act on behalf of the party. The court could excuse personal attendance on a showing of good cause and place conditions on such an excuse.

Submission of arbitration statements, pleadings, and documents

Rule 1611.5(b) would require each party to submit an arbitration statement, copies of its operative pleadings, and any evidence that it will offer at the arbitration hearing under rule 1613 to the arbitrator no later than seven days before the hearing, unless excused by the arbitrator from doing so. The arbitration statement would be required to identify the parties, representatives, attorneys, and witnesses who will attend the arbitration; summarize the claims and defenses; identify the contested factual and legal issues; and cite authority on the questions of law. The arbitrator could excuse a party from these requirements on a showing of good cause, in a manner consistent with the ex parte communication provisions of rule 1610(b).

Presentation of evidence at arbitration hearing

Rule 1611.5(c) would require each party to (1) offer evidence concerning the issues raised by the pleadings or arbitration statements on which that party has the burden of proof and (2) respond, by evidence or by argument, to the issues on which an opposing party has the burden of proof and has made a prima facie showing. Rule 1615 would be amended to provide that, on the request of any party, the arbitrator's award must state whether the arbitrator finds that a party failed to satisfy these requirements.

Sanctions for noncompliance

Code of Civil Procedure sections 177.5 and 575.2 and rule 277 of the California Rules of Court currently provide for the imposition of sanctions for violation of a court order, local rule, and statewide rule of court. Rule 1611.5(d) would highlight that these provisions may be applied if a party or an attorney willfully fails to participate in judicial arbitration as required.

Participation in Civil Action Mediation

Attendance at mediation

Rule 1634(a) would clarify the current requirement that all parties, attorneys of record, and insurance representatives personally attend all mediation sessions, unless excused by the mediator. It would add a new requirement that any excuse from attendance be confirmed in writing.

Submission of participant lists and mediation statements

Rule 1634(b) would require each party to serve a list of all persons who will participate in the mediation on the mediator and the other parties no later than seven days before the first mediation session, and to update that list if additional participants are identified. It would also authorize the mediator to require each party to submit a short statement about the issues in dispute and possible resolutions of those issues.

Sanctions for noncompliance

As noted above, the Code of Civil Procedure and the California Rules of Court currently provide for the imposition of sanctions for violation of a court order, local rule, and statewide rule of court. Rule 1634(c) would highlight that these provisions may be applied if a party, attorney, insurer, or representative of an insurer fails to attend a civil action mediation session as required.

Attachment

Rule 1611.5 of the California Rules of Court would be adopted, and rules 1611, 1614, 1615, and 1634 would be amended, effective January 1, 2007, to read:

Rule 1611. Representation by counsel; proceedings when party absent

- (a) **[Representation by counsel]** A party to the arbitration has a right to be represented by an attorney at any proceeding or hearing in arbitration, but this right may be waived. A waiver of this right may be revoked, but if revoked, the other party is entitled to a reasonable continuance for the purpose of obtaining counsel.
- (b) **[Proceedings when party absent]** The arbitration may proceed in the absence of any party who, after due notice, fails to be present and to obtain a continuance. An award must not be based solely upon the absence of a party. In the event of a default by defendant, the arbitrator must require the plaintiff to submit such evidence as may be appropriate for the making of an award.

Advisory Committee Comment

Sanctions may also be imposed against a party or an attorney who fails to attend or participate at the arbitration hearing as required by these rules, local rules of court, or an order of court. (See rule 1611.5(d).)

Rule 1611.5. Participation in judicial arbitration

(a) [Attendance at arbitration hearing]

- (1) All parties and attorneys of record must attend the arbitration hearing in person, unless excused by the court under (3).
- (2) If a party is not a natural person, a representative of that party who is knowledgeable about the issues in dispute and authorized to act on behalf of the party must attend the arbitration hearing in person, unless the party is excused from this requirement under (3).
- (3) The court may excuse a party, a party's representative, or an attorney from attending an arbitration hearing on a showing of good cause. A request for excuse from attendance may be made and ruled on at the time the action is submitted to arbitration, by ex parte application under rule 379, or through any other procedure established by the court that allows other parties to respond to the request. The court may place conditions on an excuse from personal attendance.

1 **(b) [Submission of arbitration statements, pleadings, and evidence]**
2

3 (1) Each party must submit an arbitration statement to the arbitrator and serve
4 it on all other parties no later than seven days before the arbitration
5 hearing. The arbitration statement must not be filed or lodged with the
6 court unless relevant to determine whether a party complied with the
7 requirements to participate in the arbitration. The arbitration statement
8 must be concise and must:
9

10 (A) Identify, by name, the attorneys, parties, and representatives of
11 parties who will attend the arbitration;
12

13 (B) Summarize the claims and defenses, identify the significant
14 contested factual and legal issues, and cite authority on the questions
15 of law; and
16

17 (C) Identify all proposed witnesses.
18

19 (2) Each party must submit copies of its operative pleadings and any
20 evidence that it will offer at the arbitration hearing under rule 1613 to the
21 arbitrator no later than seven days before the hearing.
22

23 (3) The arbitrator may excuse a party from the requirement to submit an
24 arbitration statement, pleadings, or evidence on a showing of good cause
25 in a manner consistent with the ex parte communication provisions of rule
26 1610(b).
27

28 **(c) [Presentation of evidence at arbitration hearing]**
29

30 (1) Each party must offer evidence concerning the issues raised by the
31 pleadings or arbitration statements on which that party has the burden of
32 proof.
33

34 (2) Each party must respond, by evidence or by argument, to the issues on
35 which an opposing party has the burden of proof and has made a prima
36 facie showing.
37

38 **(d) [Sanctions for noncompliance]** The court may impose sanctions under Code
39 of Civil Procedure section 177.5 or 575.2, or under rule 227, if a party or an
40 attorney willfully fails to participate in judicial arbitration as required by the
41 rules in this chapter, local rules of court, or an order of the court.

1 **Rule 1614. Conduct of the hearing**

2
3 (a) **[Arbitrator's powers]** The arbitrator has the following powers; all other
4 questions arising out of the case are reserved to the court:

- 5
6 (1) To administer oaths or affirmations to witnesses;
7
8 (2) To take adjournments upon the request of a party or upon his or her own
9 initiative when deemed necessary;
10
11 (3) To permit testimony to be offered by deposition;
12
13 (4) To permit evidence to be offered and introduced as provided in these
14 rules;
15
16 (5) To rule upon the admissibility and relevancy of evidence offered;
17
18 ~~(6) To invite the parties, on reasonable notice, to submit trial briefs;~~
19
20 ~~(7) (6)~~ To decide the law and facts of the case and make an award
21 accordingly;
22
23 ~~(8) (7)~~ To award costs, not to exceed the statutory costs of the suit; and
24
25 ~~(9) (8)~~ To examine any site or object relevant to the case.
26

27 (b) ***
28

29 **Rule 1615. The award; entry as judgment; motion to vacate**

30
31 (a) **[The award; form and content]**

- 32
33 (1) The award must be in writing and signed by the arbitrator. It must
34 determine all issues properly raised by the pleadings, including a
35 determination of any damages and an award of costs if appropriate.
36
37 (2) On the request of any party, the arbitrator's award must state whether the
38 arbitrator finds that a party failed to offer evidence, or to respond to a
39 prima facie showing made by another party, on specified issues, as
40 required by rule 1611.5(c). The arbitrator may also include such findings
41 in the award without a request by a party.

1 ~~(2)~~(3) The arbitrator is not required to make findings of fact or conclusions
2 of law.

3
4 (b)–(d) ***

5
6 **Rule 1634. ~~Appearance at mediation sessions~~ Attendance, participant lists, and**
7 **mediation statements**

8
9 **(a) [Attendance]**

10
11 (1) ~~The All parties and attorneys of record must shall personally appear at the~~
12 ~~first attend all mediation sessions and at any subsequent session unless~~
13 ~~excused by the mediator as provided in (3). When the party is other than~~
14 ~~If a party is not a natural person, it shall appear by a representative of that~~
15 ~~party with authority to resolve the dispute or, in the case of a~~
16 ~~governmental entity that requires an agreement to be approved by an~~
17 ~~elected official or legislative body, by a representative with authority to~~
18 ~~recommend such agreement, must personally attend all mediation~~
19 ~~sessions, unless excused by the mediator as provided in (3).~~

20
21 (2) ~~If any party is insured under a policy of insurance that provides or may~~
22 ~~provide coverage for a claim that is a subject of the action, a~~
23 ~~representative of the insurer with authority to settle or recommend~~
24 ~~settlement of the claim must attend all mediation sessions in person,~~
25 ~~unless excused by the mediator as provided in (3).~~

26
27 (3) ~~The mediator may excuse a party, attorney, or representative from the~~
28 ~~requirement to attend a mediation session under (1) or (2) for good cause~~
29 ~~and may place conditions on an excuse. Any excuse from attendance must~~
30 ~~be confirmed in writing.~~

31
32 (4) ~~Each party is entitled to have counsel present at all mediation sessions~~
33 ~~that concern it, and such counsel and an insurance representative of a~~
34 ~~covered party also shall be present or available at such sessions, unless~~
35 ~~excused by the mediator.~~

36
37 **(b) [Participant lists and mediation statements]**

38
39 (1) ~~Each party must serve a list of the names of all attorneys, representatives~~
40 ~~of a party that is not a natural person, insurance representatives, and other~~
41 ~~persons who will participate in the mediation with or on behalf of that~~
42 ~~party on the mediator and on all other parties no later than seven days~~

1 before the first mediation session. The parties must promptly serve a
2 supplemental list if they subsequently determine that other persons will
3 participate in the mediation with them or on their behalf.
4

5 (2) The mediator may require that each party submit a short mediation
6 statement providing information about the issues in dispute and possible
7 resolutions of those issues. The mediator must notify the parties of any
8 such requirement and of whether the statement is to be served on other
9 parties to the action no less than 10 days before the statement must be
10 submitted.
11

12 (c) **[Sanctions for noncompliance]** The court may impose sanctions under Code
13 of Civil Procedure section 177.5 or 575.2, or under rule 227, if any party,
14 attorney, insurer, or representative of an insurer fails to attend a civil action
15 mediation as required by the rules in this chapter, local rules of court, or an
16 order of the court.